Supreme Court, U.S.
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No. 99–12

IN THE
Supreme Court of the United States

UNITY REAL ESTATE COMPANY, *et al.*,
Petitioners,

vs.

MARTY D. HUDSON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

In the petition for certiorari (Pet. 14-23), petitioners demonstrated that the decision below, in upholding a retroactive application of the Coal Act based on employee "expectations" unrelated to, inconsistent with, and vastly broader than any past employer commitments, conflicts with this Court's decision in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998). Petitioners further demonstrated (Pet. 23-27) that the decision below, in limiting the retroactivity principles endorsed by five Justices in *Eastern* to the facts of that case, conflicts with the rules for construing divided Supreme Court opinions set forth in *Marks v. United States*, 430 U.S. 188 (1977). Finally, petitioners demonstrated (Pet. 27-30) that the refusal of some lower courts to follow these principles has created significant uncertainty about the extent of protection provided by the Takings Clause and the Due Process Clause against the operation of retroactive economic statutes.

In response, respondents contend that the decision below is consistent both with *Eastern* (U.S. Opp. 14-18; Trustees' Opp. 18-25) and with *Marks* (U.S. Opp. 18-20) because the post-1974 NBCWAs at issue here, unlike the pre-1974 NBCWAs directly at issue in *Eastern*, created an assertedly "reasonable expectation" that employees would receive lifetime health benefits. However, respondents do not dispute that the plain language of the post-1974 NBCWAs repeatedly restricted all promised benefits to the term of each agreement. Instead, like the court of appeals, respondents insist that expectations must be sharply distinguished from promises — a position itself inconsistent with *Eastern's* holding that employee expectations, if unrelated to past employer promises, cannot justify the imposition of significant and severely retroactive liabilities.

Alternatively, the trustees contend (Trustees' Opp. 16-18, 27-28) that the decision below need not be consistent with *Eastern* because, under *Marks*, the retroactivity rules endorsed by five Justices in *Eastern* are not binding on the lower courts.

That is plainly incorrect, and this Court should grant review to prevent its decisions from being so eviscerated.

1. As explained in the petition for certiorari (Pet. 8-9, 14), five Justices in *Eastern* explicitly agreed that retroactive economic legislation is unconstitutional if it imposes liability that is (1) substantial in amount, (2) based on conduct far in the past, (3) unrelated to any past commitment made by the burdened party, and (4) unrelated to any past injury caused by that party. *See* 524 U.S. at 537 (plurality); *id.* at 549-50 (concurrence). As further explained (Pet. 15-22), that rule governs this case, because the post-1974 NBCWAs at issue here, like the pre-1974 NBCWAs at issue in *Eastern*, neither promised nor created any "reasonable expectation" that miners would receive lifetime health benefits.

Respondents repeatedly contend that the post-1974 NBCWAs did create a "reasonable expectation" of lifetime health benefits. Respondents invoke this alleged expectation to argue that the retroactive liabilities at issue are closely related to past promises and injuries (U.S. Opp. 18, Trustees' Opp. 21), and thus are constitutionally "proportiona[l]" in both their amount (U.S. Opp. 17, Trustees' Opp. 26-27) and degree of retroactivity (U.S. Opp. 17-18, Trustees' Opp. 25). Similarly, this allegedly "reasonable expectation" of lifetime benefits underlies respondents' rhetoric about some employers "dumping" their commitments onto others (U.S. Opp. 3, Trustees' Opp. 5, 9, 23, 25), as well as their contention that petitioners can fairly be held responsible for funding decisions made under successor NBCWAs to which they were not parties (Trustees' Opp. 22-23). However, respondents do not attempt to relate the alleged "expectation" of lifetime health benefits to the controlling terms of the post-1974 NBCWAs. On the contrary, they insist, as did the court of appeals, on a sharp distinction between the "'contract'" and the "'reasonable

expectations that might have been created by the contract.'" Trustees' Opp. 21 (quoting Pet. App. 27a).[1]

Respondents' attempt to divorce employee "expectations" from past employer promises conflicts with *Eastern*. In that case, respondents argued that the Coal Act was constitutional as applied to signatories of the pre-1974 NBCWAs because those agreements, having been repeatedly renewed for decades, created an "expectation" that health benefits "would continue" indefinitely. *See* 524 U.S. at 535 (plurality). This Court rejected that argument. In reasoning squarely embraced by five Justices, the Court held that "the question is not whether miners had an *expectation* of lifetime benefits" (*id.* (emphasis added)), but whether the retroactive Coal Act liability, which purported to vindicate that expectation, was "unrelated to any *commitment* that the employers made" prior to the statutory enactment. *Id.* at 537 (emphasis added); *see id.* at 549-50 (concurrence). The liability imposed by the Coal Act is "unrelated to any commitment" made in the post-1974 NBCWAs because those agreements, like the pre-1974 NBCWAs at issue

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[1] Respondents offer no serious contention that the retroactive liabilities imposed by the Coal Act can be justified independently of the allegedly "reasonable expectation" of lifetime health benefits. Although the trustees spend pages attacking a categorical takings argument not urged here by petitioners (Trustees' Opp. 25-27; *see* U.S. Opp. 12 n.5), respondents do not contend that the retroactive liabilities imposed on petitioners are insubstantial. Moreover, although respondents note that the degree of retroactivity at issue here is less severe than the 30-year reachback at issue in *Eastern* (U.S. Opp. 17, Trustees' Opp. 24-25), they do not seriously argue that the eleven- and eight-year reachbacks at issue (or, as respondents miscalculate, the eight- and four-year reachbacks) can be justified as "short and limited periods required by the practicalities of producing national legislation," *United States v. Darusmont*, 449 U.S. 292, 296-97 (1981) (per curiam). Finally, although the government contends that the Coal Act is "designed to remedy injuries caused by petitioners" (U.S. Opp. 18), the only "injury" it can point to is the frustration of an alleged "expectation" of lifetime health benefits.

in *Eastern*, explicitly limited all promised benefits to the term of each agreement. As explained in the petition for certiorari (Pet. 3-5, 16-17), at least four NBCWA provisions incorporated such limitations: Article XX(c) limited the "benefits provided" to "the term of this Agreement" (Pet. App. 116a-17a, 135a-36a, 156a-57a); Article XX(d) limited "[c]ontributions by [e]mployers" to "the life of this Agreement" (Pet. App. 99a-101a, 118a-21a, 137a-39a, 158a-60a); Article XX(h) limited the "benefits provided," and the guarantee of full funding, to "the term of this Agreement" (Pet. App. 121a, 140a, 161a); and Article III of the incorporated plan documents warned that "benefits may be suspended or reduced" after the underlying NBCWA had expired (Pet. App. 110a-13a, 131a-32a, 152a-53a, 173a-74a). Respondents do not even acknowledge, much less attempt to explain away, any of these emphatically clear limitations on the "commitment[s]" underlying the alleged "expectation" of lifetime health benefits.[2]

Respondents also attempt (U.S. Opp. 2-3, Trustees' Opp. 4, 21) to derive an assertedly "reasonable expectation" of lifetime benefits from statements that miners would retain a health insurance card "for life" or "until death." That analysis also conflicts with *Eastern*, in which five Justices ignored "isolated statements" inconsistent with the operative contractual terms. *See* 524 U.S. at 535 (plurality); *id.* at 549-50 (concurrence). The statements cited by respondents all appeared in a "General

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[2] The trustees briefly suggest (Trustees' Opp. 21) that the post-1974 NBCWAs promised, but then did not fund, lifetime health benefits. The NBCWAs cannot bear that construction: Articles XX(c) and XX(h) of each NBCWA, and Article III of each incorporated trust document, expressly limited employee "benefits" to the term of each agreement, just as Articles XX(d) and XX(h) of each NBCWA limited employer "contributions" to the term of each agreement. Accordingly, the cases upholding the imposition of retroactive liability for underfunded pension benefits, *Concrete Pipe & Products v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993), and *PBGC v. R.A. Gray & Co.*, 467 U.S. 717 (1984), are plainly inapposite here, just as they were in *Eastern*.

Description" or "Summary" of benefits (Pet. App. 101a-08a, 121a-30a, 140a-51a, 161a-72a) attached to the post-1974 NBCWAs. However, the NBCWAs themselves explicitly qualified the General Description "in the event of any inconsistencies" (Pet. App. 133a, 154a); the General Description by its terms was "qualified in its entirety by" the NBCWAs (Pet. App. 121a, 140a, 161a); and, in any event, the General Description by its terms stated that "benefits are guaranteed" only "during the term of this Agreement" (Pet. App. 129a, 149a, 171a). As Judge Aldisert noted, "[t]o suggest that the clear language limiting benefits to the term of the Wage Agreement is trumped by the 'lifetime' health card is a stretch." Pet. App 58a (concurring in the judgment).[3]

Respondents further contend (U.S. Opp. 16, 19-20, Trustees' Opp. 18-20, 22 n.6) that *Eastern* itself authoritatively construed the post-1974 NBCWAs to have promised lifetime health benefits. However, those agreements were not at issue in *Eastern*, were only partially included in the record in that case, and were not the subject of any adversarial debate.[4]

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[3] The retention of a "health services card" ensured that miners would not lose health benefits (1) because they already had received benefits for a fixed number of years, *see UMWA Health & Retirement Funds v. Robinson*, 455 U.S. 562, 565-67 (1982); (2) because their employer had become delinquent in contributions to the UMWA funds, *see Blankenship v. Boyle*, 329 F. Supp. 1089, 1104 (D.D.C. 1971); or (3) because they had recently switched jobs, *see Connors v. Link Coal Co.*, 970 F.2d 902, 903 (D.C. Cir. 1992). These considerations in no way suggest that miners had been promised or could reasonably expect benefits even after an NBCWA had expired, and even if no successor agreement was in place.

[4] The employer in *Eastern*, seeking to present the narrowest possible ground for invalidating the Coal Act as applied in that case, affirmatively embraced the mistaken proposition that the post-1974 NBCWAs had promised lifetime health benefits. *See, e.g.*, Petition for Certiorari at 18-19, *Eastern Enters. v. Chater* (No. 97-42) ("It was only beginning in 1974, almost a decade after Eastern's departure from the industry, that successor wage agreements guaranteed lifetime retiree health benefits . . . .").

Accordingly, this Court explicitly reserved the question whether the pre-1974 NBCWAs (purportedly enforced through 26 U.S.C. § 9706(a)(3)) are materially different from the post-1974 NBCWAs (purportedly enforced through § 9706(a)(1) and (2)). *See* 524 U.S. at 515, 538 (plurality); *id.* at 549-50 (concurrence).[5]

Finally, the trustees, but not the government, assert many other insubstantial objections. First, they assert (Trustees' Opp. 16 n.5) that petitioners did not preserve their current argument below. In fact, petitioners did so repeatedly. *See, e.g.*, Letter Brief of Appellants at 2-5, 8-11 (Aug. 20, 1998); Joint Supplemental Submission of Appellants and Amici at 2-19 (Dec. 23, 1998). The trustees also argue (Trustees' Opp. 20) that Congress "is not fettered by the terms of private contracts." That proposition is true where prospective legislation is at issue. Even where retroactive legislation is at issue, it is also true if only an insubstantial burden is at issue, if the degree of retroactivity is short, or if the legislation remedies injuries caused by the regulated party. However, if none of these limiting principles is present, and if the retroactive liability is also unrelated to the employer's past contractual or other commitments, *Eastern* makes clear that the legislation is unconstitutional. *See* 524 U.S. at 537 (plurality); *id* at 549-50 (concurrence). Similarly inapposite is the trustees' statement (Trustees' Opp. 24) that a long reachback period "alone is insufficient" to establish unconstitutionality; petitioners make no such contention. Finally, the trustees suggest that the Coal

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[5] The passages cited by respondents only confirm this Court's careful agnosticism on that question. *See, e.g.*, 524 U.S. at 530 (plurality) (post-1974 NBCWAs "first *suggest* an industry commitment to the funding of lifetime health benefits" (emphasis added)); *id.* at 535 ("Not until 1974 . . . *could* lifetime medical benefits under the multiemployer agreement have been viewed as promised." (emphasis added)); *id.* at 535-36 (post-1974 NBCWAs made "a guarantee of defined benefits, *at least* for the life of the agreements" (emphasis added)).

Act might not be "retrospective at all" (*id.*). That suggestion is frivolous, as even a cursory examination of *Eastern* makes clear.[6]

2. As explained in the petition for certiorari (Pet. 24-27), the decision below conflicts with *Marks* and *King v. Palmer*, 950 F.2d 771 (D.C. Cir. 1991) (en banc), *cert. denied*, 505 U.S. 1229 (1992), because it refused to give effect to the points of agreement between the *Eastern* plurality and concurrence, and did give effect to the points of agreement between the *Eastern* concurrence and dissent. The government does not attempt to defend the court of appeals' principal *Marks* holding (Pet. App. 16a-17a) that opinions resting respectively on the Takings Clause and the Due Process Clause cannot form a *Marks* majority, regardless of their extent of agreement on the specific rule at issue. Instead, the government acknowledges that the *Eastern* plurality and concurrence "form a

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[6] Respondents make no attempt to defend the Coal Act either on the ground that the coal industry is heavily regulated, as Chief Judge Becker suggested (Pet. App. 25a-26a), or on the ground that courts must defer to Congress's demonstrably incorrect contract constructions, as Judge Aldisert suggested (Pet. App. 55a-59a). As explained in the petition for certiorari (Pet. 21-22), these rationales also conflict with *Eastern*. The trustees briefly assert (Trustees' Opp. 6 n.3) that the Coal Commission examined the post-1974 NBCWAs "in detail." Like the briefs in opposition, however, the Coal Commission Report (Supp. App. 389-91) does not even acknowledge, much less discuss, *any* of the controlling NBCWA provisions. That is hardly surprising because, despite the trustees' suggestion to the contrary, the Coal Commission did not represent the interests of *former* mining companies such as petitioners. Former NBCWA signatories who "continued to operate in the Coal industry" (Trustees' Opp. 6 n.3) were subject to Evergreen Clause liability in any event, *see UMWA 1974 Pension v. Pittston Co.*, 984 F.2d 469 (D.C. Cir.), *cert. denied*, 509 U.S. 924 (1993); Pet. 5 n.2, and thus had every incentive to conjure up another theory (based on the alleged promise of lifetime benefits) for extending liability to former NBCWA signatories who, like petitioners, had already left the industry.

majority rationale" (U.S. Opp. 19-20), but contends that, under that rationale, the Coal Act is constitutional as applied to companies that signed post-1974 NBCWAs. That position rests on the premise that *Eastern* construed the post-1974 NBCWAs to have promised "health benefits for life" (U.S. Opp. 19). As explained above, that premise is mistaken.

The trustees do repeatedly argue (Trustees' Opp. 16-18, 27-28) that takings and due process opinions may never form a *Marks* majority. However, the trustees err in reasoning that to recognize common legal principles in such opinions is to create "'generalized claims of unconstitutionality.'" *Id.* at 18, quoting *Association of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246, 1253-54 (D.C. Cir. 1998) ("*ABC*"). As explained in the petition for certiorari (Pet. 24-25), any agreed-upon legal rules are themselves a "common denominator," *King*, 950 F.2d at 781, and the trustees offer no sound reason why, as a matter of logic or precedent, it should matter whether those rules derive from more general takings or due process principles.

The trustees further err in contending (Trustees' Opp. 28-29) that the decision below is consistent with *King* on the question whether a concurrence and a dissent can form a *Marks* majority. In this case, the court of appeals foreclosed all takings scrutiny of the Coal Act because, under the *Eastern* concurrence and dissent, "[t]here are five votes against the plurality's Takings Clause analysis." Pet. App. 15a-16a. In *King*, by contrast, the D.C. Circuit specifically held that "we do not think we are free to combine a dissent with a concurrence to form a *Marks* majority." 950 F.2d at 783.

Finally, the trustees err in contending (Trustees' Opp. 29) that *City of Erie v. Pap's A.M.* (No. 98-1161) is irrelevant because the *Marks* issues in *Pap's* arise in the context of a First Amendment challenge to a nude dancing ordinance. Before even addressing that question on the merits, the petitioners in *Pap's* contend as a threshold matter that this Court's

fragmented decision in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), is controlling under *Marks*. *See* Brief for Petitioners at 11-18 (Aug. 16, 1999), *City of Erie v. Pap's A.M.* (No. 98-1161). This Court's resolution of that question should elucidate *Marks* as much as it does *Barnes*.

For these reasons, the Court should grant review to determine whether *Eastern* controls only "substantially identical" cases involving pre-1974 NBCWAs, as the court of appeals held in this case (Pet. App. 16a-17a); whether *Eastern* constitutes only a "specific result" in a single case, as the D.C. Circuit absurdly held in *ABC* (156 F.3d at 1254-55); or whether, as at least one other court already has recognized, *Eastern* "stands for a clear principle: a liability that is severely retroactive, disruptive of settled expectations and wholly divorced from a party's experience may not constitutionally be imposed. We draw that conclusion from the language offered both by the plurality and by the concurrence." *Maine Yankee Atomic Power Co. v. United States*, 44 Fed. Cl. 372, 378-79 (1999) (citing *Marks* and *King*). At a minimum, the Court should hold this case pending resolution of the *Marks* issues in *Pap's*.[7]

3. As explained in the petition for certiorari (Pet. 27-29), the refusal of some lower courts to follow *Eastern* has created

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[7] The trustees err in stating (Trustees' Opp. 28) that there is no "persistent or intractable problem" in interpreting and applying *Marks*. Courts have struggled mightily with this problem. *See, e.g.*, *King*, 950 F.2d at 779-85; *Planned Parenthood v. Casey*, 947 F.2d 682, 691-98 (3d Cir. 1991), *aff'd in part and rev'd in part*, 505 U.S. 833 (1992); *Pap's A.M. v. City of Erie*, 719 A.2d 273, 276-79 (Pa. 1998), *cert. granted*, 119 S. Ct. 1753 (1999); *see generally* Kimura, *A Legitimacy Model for the Interpretation of Plurality Decisions*, 77 Cornell L. Rev. 1593 (1992); Thurmon, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 Duke L.J. 419 (1992); Novak, *The Precedential Value of Supreme Court Plurality Decisions*, 80 Colum. L. Rev. 756 (1980). Moreover, given the steadily increasing number of plurality opinions (Pet. 24 n.22), this confusion will surely accelerate.

significant uncertainty regarding the extent to which the takings and due process clauses afford protection against retroactive economic statutes. The government concedes (U.S. Opp. 21-22) that the Seventh Circuit has continued to entertain regulatory takings claims even where the statute at issue, like the Coal Act, imposes only general monetary liabilities. *See Central States, Southeast & Southwest Areas Pension Fund v. Midwest Motor Express, Inc.*, 181 F.3d 799, 808-09 (7th Cir. 1999) (MPPAA case), *cert. pending* (No. 99-420). However, the First Circuit, like the court of appeals below (Pet. App. 15a-17a), has held that the Takings Clause is entirely inapplicable in this context. *See Parrella v. Retirement Bd. of the Rhode Island Employees' Retirement Sys.*, 173 F.3d 46, 58-59 & n.10 (1st Cir. 1999). Moreover, respondents cannot seriously dispute that the lynchpin of the controlling *Eastern* opinions, that "[r]etroactivity is generally disfavored," 524 U.S. at 532 (plurality), and that, "for centuries our law has harbored a singular distrust of retroactive statutes," *id.* at 547 (concurrence), is precisely the opposite of the otherwise controlling principle that even retroactive statutes "are clothed in a formidable presumption of constitutionality," *Eastern Enters. v. Chater*, 110 F.3d 150, 155 (1st Cir. 1997) (citing *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976)), *rev'd sub nom. Eastern Enters. v. Apfel*, 524 U.S. 498 (1998).[8]

CONCLUSION

The petition for a writ of certiorari should be granted.

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[8] The trustees concede (Trustees' Opp. 2-3, 14-15) the breadth and importance of the questions presented.

Respectfully submitted,

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